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Mortgagee Sale Obligations Tightened

The enactment of the *Property Law (Mortgagor Protection) Amendment Act 2008* (Qld), means that the obligations of a mortgagee exercising power of sale or a receiver selling have been substantially tightened in Queensland.

Background

As explained in the explanatory notes accompanying the legislation, with current global economic and financial circumstances, there were concerns about the position of mortgagors when mortgagees exercised their powers of sale. The objective of the amending legislation was to protect the interests of mortgagors by strengthening the statutory provisions relating to the duty of the mortgagee exercising power of sale to take reasonable care to ensure the property is sold at market value. The amending legislation was urgently passed without any consultation process.

Effect of Amendment

Following amendment, s 85 now provides as follows:

85 Duty of mortgagee or receiver as to sale price

(1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.

(1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse—

- (a) adequately advertise the sale; and
- (b) obtain reliable evidence of the property's value; and
- (c) maintain the property, including by undertaking any reasonable repairs; and
- (d) sell the property by auction, unless it is appropriate to sell it in another way; and
- (e) do anything else prescribed under a regulation.

Maximum penalty—

- (a) if the contravention of duty relates only to paragraph (e)—20 penalty units; or
- (b) otherwise—200 penalty units.

(2) Within 28 days from completion of the sale, the mortgagee shall give to the mortgagor notice in the approved form.

(3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.

(4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) commits an offence.

Maximum penalty—2 penalty units.

(5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or receiver from the duty imposed by this section.

(6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.

(7) Nothing in sections 83(1)(a), 89(3) and 92(2) affects the duty imposed by this section.

(8) Nothing in this section affects the operation of a law of the Commonwealth, including, for example, the Corporations Act, section 420A.

(9) This section applies to mortgages whether made before or after the commencement of this Act but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this Act.

(10) In this section—

prescribed mortgage means a mortgage of a kind prescribed under a regulation.

The effect of these amendments is to extend the duty imposed under s 85 to situations where property is sold by a receiver under a delegated power or by the mortgagee acting as attorney for the mortgagor. Further, to satisfy the obligation to take reasonable care to ensure the property is sold at market value, s 85(1A) specifies the steps which must be taken by a mortgagee or a receiver for a 'prescribed mortgage'.

Under the terms of the *Property Law Regulation 2003* (Qld), for the purposes of s 85, a mortgage is a prescribed mortgage if it is a mortgage over residential land and the mortgagor's home is on the land. The regulation further provides that it

does not matter that a residence is also used for a business purpose if the residence is primarily used as the mortgagor's home.

Failure to follow the steps specified in relation to a 'prescribed mortgage' constitutes an offence with the maximum penalty being \$20,000.

Comment

The level of statutory prescription imposed by s 85(1A) upon a mortgagee or receiver in relation to a sale under a prescribed mortgage is without precedent elsewhere in Australia. Given this, and the significant penalty associated with failure to comply with the legislation, it may be considered unfortunate that these legislative amendments were introduced without the benefit of any consultation process. Only time will tell what may constitute a 'reasonable excuse' for non-compliance.

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